(2)
Supreme Court, U.S.
FILED
DEC 13 2002
OFFICE OF THE CLERK

No. 02-750

In the

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,

Petitioner,

v.

WASHINGTON COUNTY and CITY OF TIGARD,

Respondents.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AGENCIA LA ESPERANZA CORPORATION, INC., IN SUPPORT OF PETITIONER

JAMES S. BURLING
MERIEM L. HUBBARD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc.

17 pp

QUESTION PRESENTED

May a local government exact development fees it has adopted through a legislative process without complying with the "rough proportionality" standards of *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

ARGUMENT 5

I. WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW 5

II. THE PETITION FOR CERTIORARI DESCRIBES A SPLIT OF AUTHORITY AMONG VARIOUS STATE COURTS, BUT DOES NOT EXPLAIN THAT THE SPLIT ALSO INVOLVES THE LOWER FEDERAL COURTS 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States, 364 U.S. 40 (1960) 5

City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995) 11

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... passim

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) 4, 7

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994) 5-6

National Association of Home Builders of the United States v. Chesterfield County, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996) 10-11

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1, 5-6, 9-10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1

Rogers Machinery, Inc. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002) 3-4, 8

Rogers Machinery, Inc. v. Washington County, 52 P.3d 1057 (Or. 2002) 4

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002) 4, 8-9

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 1

Statutes

Wash. County Code ch. 3.17, § 3.17.020 3-4

TABLE OF AUTHORITIES—Continued

Page

Supreme Court Rules

Rule 37 1

Rule 37.6 1

Miscellaneous

Burling, James S., *Development Fees and the Supreme Court's Takings Jurisprudence: A Close Fit?*, ALI-ABA Course of Study Materials, Inverse Condemnation and Related Government Liability (1996) 5

Callies, David L., *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523 (1999) 6

Eagle, Steven J., *Symposium: When Does Retroactivity Cross the Line?* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977 (2000) ... 9

Huffman, James L., *Colloquium on* Dolan v. City of Tigard*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143 (1995) 6-7

Institute of Transportation Engineers, *Trip Generation* (6th ed. 1997) 2

Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242 (2000) 7-8

IDENTITY AND INTEREST OF AMICI CURIAE [1]

Amicus Pacific Legal Foundation (PLF) is a nonprofit, public interest legal foundation that specializes in defending property rights and other individual liberties. For more than 25 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the past 25 years.

Amicus Agencia La Esperanza Corporation, Inc. (Esperanza) is a privately held California corporation. Esperanza is the petitioner in a petition for writ of certiorari, pending before this Court, that raises precisely the same issue as that presented in this case. *See Agencia La Esperanza Corporation, Inc. v. Orange County Board of Supervisors, et al.*, Supreme Court Case No. 02-638.

The facts underlying Esperanza's petition are simple. Esperanza was assessed transportation mitigation fees as a

---

[1] Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc., respectfully submit this brief amicus curiae in support of Rogers Machinery. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc., affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

condition of receiving a permit to build a 110,414-square-foot self-storage facility[2] in Orange County, California. The fees, totaling $194,880, were imposed under two legislatively adopted fee programs. Under both fee programs, the amounts of the fees imposed on new development are based on general factors that do not account for differences in traffic generation rates for various types of commercial development. The fees are calculated based on the use (commercial or residential), the gross square footage, and the area of benefit as defined in the fee programs. So commercial, nonresidential development projects, such as Esperanza's self-storage facility, are assessed fees at the same amount per square foot as all other nonresidential uses in the same area of benefit. The fee programs do not account for the fact that self-storage facilities generate significantly less traffic than do most other types of commercial development.

The result is that Esperanza was assessed development impact fees far exceeding the per trip amount assessed on commercial facilities that generate far more traffic. Under one of the fee programs, Esperanza's fee is more than 12.5 times greater per trip generated than the fee assessed against commercial projects of a similar size in the same area of benefit.

In an action challenging the sufficiency of the relationship of the development fees and the effects attributable to its development project, Esperanza argued that the fee structure amounts to an unconstitutional taking and that the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is the proper test for determining the

---

[2] The Institute of Transportation Engineers refers to self-storage facilities as mini-warehouses and defines them as buildings in which a number of storage units or vaults are rented for the storage of goods. *See* Institute of Transportation Engineers, *Trip Generation* (6th ed. 1997).

constitutionality of the relationship between the fees and the impact of the project. The California Court of Appeal rejected both arguments and held that *Dolan*'s rough proportionality test does not apply to legislatively imposed exactions.[3] To challenge that ruling, Esperanza filed a petition for a writ of certiorari.

Amici believe that property owners and local governments would benefit from a ruling by this Court on the question of whether the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374, applies to legislatively imposed exactions.

STATEMENT OF THE CASE

The facts of the case are set forth in *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App. 2002). Rogers Machinery Company, Inc., maintained its headquarters in a single building located in Tigard, Oregon, until that building became outdated and overcrowded. *Id.* at 967. In 1997, Rogers sought a permit to construct a second building on the same property so that some employees could be moved from the existing building to the new building. *Id.* No additional employees were to be hired, and it was undisputed that the new space would not increase traffic to and from the site. Petition for Writ of Certiorari at 3.

Although Rogers' new building would generate no new traffic, Rogers was forced to pay a Traffic Impact Fee (TIF) of approximately $37,000 before it could obtain a building permit. *See Rogers Machinery*, 45 P.3d at 967-68. The TIF, imposed on all new development pursuant to County ordinance, was adopted to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development." Wash.

---

[3] The decision of the California Court of Appeal is unreported, as is the California Supreme Court's denial of review.

County Code, ch. 3.17, § 3.17.020. *Rogers Machinery*, 45 P.3d at 968. The TIF ordinance is jointly administered by Washington County and the City of Tigard, and requires that the fees assessed on new development are calculated according to a set formula. *Id.* at 967-69.

Rogers objected to the fee imposed on its project, and argued that the fee violates the Fifth Amendment to the United States Constitution because it does not meet the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374. *Id.* at 968. The Washington County Hearings Officer, the Washington County Circuit Court, and the Oregon Court of Appeals disagreed. *Id.*

The Oregon Court of Appeals held that legislatively imposed and calculated development fees are not subject to *Dolan*. *Rogers Machinery, Inc. v. Washington County*, 45 P.3d at 983. The court agreed with the California Supreme Court's contention in *Ehrlich v. City of Culver City*[4] and *San Remo Hotel L.P. v. City and County of San Francisco*[5] that *Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions." *Rogers Machinery*, 45 P.3d at 982.

The Oregon Supreme Court denied review. *Rogers Machinery, Inc. v. Washington County*, 52 P.3d 1057 (Or. 2002).

---

[4] 911 P.2d 429 (Cal. 1996).

[5] 41 P.3d 87 (Cal. 2002).

ARGUMENT

I

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW

A development exaction is a demand that a property owner give up something of value as a condition of obtaining government approval to build on property. Exactions can take the form of land, an interest in land, or money. *See* James S. Burling, *Development Fees and the Supreme Court's Takings Jurisprudence: A Close Fit?*, ALI-ABA Course of Study Materials, Inverse Condemnation and Related Government Liability (1996). And exactions can be imposed on an individual and discretionary basis or by legislation of general applicability. Regardless of their form or source, requiring that exactions have a nexus (*see Nollan v. California Coastal Commission*, 483 U.S. at 837), and are subject to "rough proportionality" under *Dolan v. City of Tigard*, 512 U.S. 374, is perfectly sensible and effective to insulate landowners from overreaching governmental entities that might otherwise take unfair advantage of persons during the application process.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The nexus and rough proportionality requirements provide a means to ensure that the purpose of the Fifth Amendment is fulfilled. *See, e.g., Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994) (The New York Court of Appeals held that a rent stabilization ordinance failed the constitutional test because it created an "indeterminate and unjustifiable burden draped

disproportionately on the particular owners' shoulders." *Id.* at 483.). *See also* James L. Huffman, *Colloquium on* Dolan v. City of Tigard*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143, 150 (1995) ("The takings clause [protects against majoritarian tyranny] by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." *Id.* at 152.).

There is no doctrinal basis to limit the application of *Dolan* to administrative or quasi-judicial government acts. Legal scholars argue that neither the Fifth Amendment nor the takings precedents support a legislative/adjudicative distinction between exactions, and those scholars urge an integrated doctrine that recognizes the constitutional equivalency of all exactions. *See* Huffman, *supra*, at 150 (Dean Huffman acknowledges the important procedural implications of a legislative/adjudicative distinction, but goes on to say that "it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property rights. From the point of view of the property owner, the consequence of a taking is the same whether done by the legislative, executive, or judicial branches of government. The Fifth Amendment draws no such distinction."). *See also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 575 (1999) (Land development conditions require a legitimate state interest, nexus and proportionality. "These rules extend to exactions beyond physical dedications even though *Nollan* and *Dolan* were land dedication cases. . . . Why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless." *Id.*).

Those courts that distinguish between legislative and adjudicative exactions claim that when exactions are imposed in the form of generally applicable legislation, property owners do not encounter the heightened risk of extortionate use of the government's police power to impose unconstitutional exactions. *See, e.g.*, *Ehrlich v. City of Culver City*, 911 P.2d at 444. Legal scholars disagree. *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000) ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." *Id.* at 267.); Huffman, *supra*, at 146 (Government is reluctant to compensate property owners impacted by regulation. And, "[t]he drafters of the takings clause understood that we should expect nothing different from government. Absent judicial enforcement of the takings clause, governments have every incentive to take private property without compensation. Democracy will deter such wealth redistribution only when large numbers of people are likely to bear the costs. The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy." *Id.*).

One commentator argues that local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. Reznik, *supra*, at 270-72. Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Those types of programs do not allow government to consider widely varying individual circumstances, and do not provide a means to accommodate those who do not fit within a program's general categories.

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court said that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105. *See Rogers Machinery v. Washington County*, 45 P.3d at 982, wherein the Court of Appeals of Oregon cited the quoted language.

While the democratic political process may, as the California Supreme Court suggested, protect against "extortionate fees for all property development," it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. Developers are exactly the kind of minority whose interests might be ignored by the majority. And they are oftentimes not local and thus are unable to participate in the local political process. *See* Reznik, *supra*, at 271-72. The Takings Clause is intended to protect against that sort of majoritarian oppression.

In the complex area of land use regulation there is no generally recognized clear distinction between legislative and adjudicative actions on which to draw a constitutional line. *See* Reznik, *supra*, at 257-66 (The blending of legislative, administrative, and judicial functions is common in land use

decisionmaking.). *And see* Steven J. Eagle, *Symposium: When Does Retroactivity Cross the Line?* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000) ("The problem of discerning which statutes are legislative and which are adjudicative for purposes of a Dolan analysis is apt to be open-ended and chronic.").

Significantly, both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action. In *Nollan*, this Court noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements." 483 U.S. at 833 n.2. In other words, just as in the present case, the Coastal Commission's statewide exaction policy was applied on a uniform and consistent basis. The statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and was adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the community development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways").

The use of arbitrary distinctions, like the legislative/adjudicative distinction, to apply a less exacting standard of review to legislatively imposed exactions leads to arbitrary results. If an exaction is imposed on one property owner, it is subject to the nexus and rough proportionality standards. But if an identical exaction is imposed on a class of property owners, it is not. "The nature of the wrong is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over." *San Remo Hotel v. City and County of San Francisco*, 41 P.3d at 124 (Brown, J., dissenting).

Local governments will prefer to utilize their legislative power to impose exactions if such exactions are not subject to

the same exacting standard as applies to adjudicative exactions. And local governments will use their legislative powers to circumvent the constitutional protections provided to property owners in *Nollan* and *Dolan*.

II

THE PETITION FOR CERTIORARI DESCRIBES A SPLIT OF AUTHORITY AMONG VARIOUS STATE COURTS, BUT DOES NOT EXPLAIN THAT THE SPLIT ALSO INVOLVES THE LOWER FEDERAL COURTS

Petitioner discusses the nationwide split of authority among the state courts on the question of *Dolan*'s applicability to legislatively adopted exactions. Petition for Writ of Certiorari at 5-10. Amici add that the split also involves two lower federal courts, both of which refuse to let the method by which exactions are imposed dictate the constitutional test to be applied in a regulatory takings case.

In *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996), the district court upheld a Chesterfield County Policy adopted to guide the county's acceptance of proffers allowed by an earlier-adopted ordinance. The money from the proffers was to be used to offset the increased cost of specific capital improvements necessitated by proposed residential developments. *Id.* at 168-69. The policy, applicable to all residential rezoning requests, established a method for calculating the maximum proffer that could be tendered with a rezoning application. *Id.* at 168.

The Home Builders asserted that, on its face, the proffer policy "violates the Fifth Amendment to the United States Constitution's prohibition on taking of property without just compensation." *Id.* at 167. The court applied the *Dolan*

standard despite the legislative origin of the exaction and found the standard was satisfied. In the words of the court:

> there is no reason apparent on the face of the Policy why the proffers required, if any, can not [be] determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard.*

Id. at 169.

City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995), involved a challenge to a low-income housing fee imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 12-13. The developers negotiated with city authorities to obtain a zoning change, and those negotiations resulted in several draft ordinances. *Id.* at 13. The draft ordinance ultimately approved by the city planning board provided for a payment or impact fee "designed to compensate the City for the impact upon it expected to result from the loss of low income housing." *Id.* at 13. And the parties negotiated more impact fees to be paid to the city by the developers in accordance with the terms of a promissory note. *Id.* at 13.

The challenge to the fees was burdened with a statute of limitations issue that dominated the opinion, but the court noted that undisputed facts showed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 14. The court uses the term "rational nexus" as a *Dolan*-style assessment of the relationship between the amount of a fee and the burdens imposed on a municipality by the development. "The district court . . . went on to find factually that no rational nexus existed here as between the $2,500,000 payment sought by the City and any demonstrable burden to be borne by it due to the zoning change." *Id.* at 13.

These lower federal court decisions conflict with the decision of the Oregon Court of Appeals in this case and all of the other state court decisions that reject the applicability of *Dolan* to legislatively imposed exactions. Only this Court can resolve the conflict.

CONCLUSION

Amici respectfully urge this Court to resolve the conflict between the lower state and lower federal courts and decide whether the "rough proportionality" standard of *Dolan* applies to all exactions, including legislatively imposed exactions.

DATED: December, 2002.

Respectfully submitted,

JAMES S. BURLING
MERIEM L. HUBBARD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc.